

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**MARSHALL WAYNE ALWERDT, and
DEBRA KAY ALWERDT,**

Debtors.

Case No. **03-62701-7**

MEMORANDUM OF DECISION

At Butte in said District this 6th day of July, 2005.

In this Chapter 7 bankruptcy, after due notice hearing was held at Great Falls on June 30, 2005, on the Trustee's Application for Payment of Attorney Fees and Costs for John E. Seidlitz, Jr. ("Seidlitz"), filed June 3, 2005. No objection was filed, and no appearance was made at the hearing in opposition to the Trustee's Application, which seeks an award of attorney's fees for Seidlitz in the amount of \$4,787.60 and costs in the amount of \$1,124.14 for Seidlitz's legal services for the Debtors in a personal injury action, which the Application states was settled on July 8, 2004, for the amount of \$16,000. The Court set the Application for hearing because Seidlitz was not employed by the estate until the Trustee filed an employment application on April 6, 2005, to employ Seidlitz, which the Court granted by Order entered April 7, 2005.

Seidlitz appeared at the hearing in support of his Application, as did the Trustee Gary S. Deschenes, and both addressed the Court. The Debtor Debra Kay Alwerdt (“Debra”) appeared and testified. At the conclusion of the hearing the Court took the Application matter under advisement, after voicing the Court’s concern about the parties’ failure to request or obtain court approval for Seidlitz’s employment for more than a year and a half after the petition date. After review of the record and applicable law, this matter is ready for decision.

This Court has jurisdiction of this Chapter 13 case under 28 U.S.C. § 1334(a). The Trustee’s Application for Payment of Attorney Fees and Costs for Seidlitz is a core proceeding under 28 U.S.C. § 157(b)(2). At issue is whether the Trustee’s Application for retroactive approval of Seidlitz’s fees and costs satisfies the requirements for *nunc pro tunc* approval of fees. For the reasons set forth below, the Court finds that the Trustee’s Application fails to show a satisfactory explanation for the failure to receive prior judicial approval of Seidlitz’s employment. Therefore, under controlling authority the Trustee’s Application for compensation of Seidlitz must be denied.

FACTS

The Debtors, represented at the time by attorney Scott M. Radford (“Radford”), filed a voluntary Chapter 7 petition, Schedules and Statements on August 18, 2003. Schedule B lists a “PI claim – May 1998 Debra Alwerdt, slip and fall at a restraunt [sic] John E. Seidlitz, Attorney for the case”. Debra testified that Radford told her the personal injury claim had to be listed on Schedule B. She further testified that Radford said not to tell Seidlitz about her Chapter 7 bankruptcy case. The personal injury claim was not claimed under an exemption on Debtors’ original Schedule C. Seidlitz testified that he was employed by the Debtors to represent them in

the personal injury case, and that he was not told about their bankruptcy case until after he completed negotiating a settlement of Debtors' personal injury claim, which the Application states was settled on July 8, 2004, for the amount of \$16,000.

The 11 U.S.C. § 341(a) meeting of creditors was held on September 18, 2003. Debra and Deschenes both testified that her personal injury claim was discussed at the § 341(a) meeting. Deschenes testified that they also discussed Seidlitz's employment at the meeting. Despite this discussion on September 18, 2003, no application to approve Seidlitz's employment by the estate was filed until April 6, 2005, when the Trustee filed an employment application which was granted by Order entered the following day. The employment application recites that the personal injury action was previously settled. It proposes that the Trustee will compensate Seidlitz with a one-third contingency fee of the amount recovered. The employment application does not recite or discuss applicable law for *nunc pro tunc* employment of professionals.

The Trustee filed a motion for turnover of the Debtors' personal injury claim on October 15, 2004, which the Court granted. Debtors subsequently moved to reconsider and amended their Schedules B and C on October 25, 2004, to claim an exemption in the personal injury proceeds. The Trustee filed an objection to Debtors' claim of exemptions, and the matter was heard on December 16, 2004. The Court entered an Order on December 21, 2004, denying Debtors' motion to reconsider. The Court directed Debtors to turn over to the Trustee all moneys arising from Debtors' personal injury action, and advised the parties that no approved settlement of the personal injury claim or award of attorney's fees to Seidlitz existed because the Court had not approved any settlement or award. Docket Nos. 20-22.

Radford moved to withdraw as Debtors' counsel. On April 1, 2005, the Trustee filed

motions to approve settlement of both the personal injury claim and his objection to Debtors' claim of exemptions in the proceeds. Finally on April 6, 2005, the Trustee filed an application to approve Seidlitz's employment by the estate, after the settlement of the personal injury claim and Trustee's objection to exemptions had been settled. Seidlitz testified that the parties' negotiations which resolved the Trustee's objection to exemption also provided for payment of his attorney's fees and costs, as well as resolving the amount of personal injury proceeds the Debtors' could claim as exempt. The Court approved both settlements by Orders entered April 14, 2005. On June 3, 2005, the Trustee filed his application for compensation of Seidlitz, requesting an award of fees in the amount of \$4,787.60 and costs of \$1,124.14 arising from the settlement of the personal injury claim negotiated on July 26, 2004.

DISCUSSION

The Court's first voiced its concern about Seidlitz's fees in its Order entered December 21, 2004, based on the failure to obtain court approval of Seidlitz's employment under 11 U.S.C. § 327 and Mont. LBR 2014-1. Local Rule 2014-1 specifically states: "Absent compelling circumstances, no compensation may be earned by professionals retained by the trustee or debtor-in-possession until after the filing of the application." "In bankruptcy proceedings, professionals who perform services for a debtor in possession cannot recover fees for services rendered to the estate unless those services have been previously authorized by a court order." *In re Atkins*, 69 F.3d 970, 973 (9th Cir. 1995); *see* 11 U.S.C. § 327(a); F.R.B.P. 2014(a); *see, e.g., McCutchen, Doyle, Brown & Enersen v. Official Comm. of Unsecured Creditors (In re Weibel, Inc.)*, 176 B.R. 209, 211 (9th Cir. BAP 1994). Under Rule 2014-1 and *Atkins*, Seidlitz cannot earn compensation for the personal injury representation until after the filing of his employment

application. With his Application for compensation being based on a contingency fee, no time sheets or other billing records are attached showing what services Seidlitz provided after his employment was approved.

In *Matter of Laurent Watch Co., Inc.*, 539 F.2d 1231 (9th Cir.1976), the Ninth Circuit found that under the Bankruptcy Act, a bankruptcy court had the power to issue a *nunc pro tunc* order of appointment for an attorney. The bankruptcy appellate panel in *In re Kroeger Properties & Development, Inc.*, 57 B.R. 821 (9th Cir. BAP 1986) concluded that bankruptcy courts retained this power with the enactment of the Bankruptcy Code. However, retroactive approval should be limited to situations in which extraordinary circumstances exist. *In re Atkins*, 69 F.3d at 974; *Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.)*, 40 F.3d 1059, 1062 (9th Cir. 1994). To justify a request for retroactive fees, counsel must "show both a satisfactory explanation for the failure to receive prior judicial approval and that he or she has benefitted the bankrupt estate in some significant way." *In re Atkins*, 69 F.3d at 974, 976; *Okamoto v. THC Financial Corp.*, 837 F.2d 389, 392 (9th Cir.1988); *In re Larson*, 174 B.R. 797, 802 (9th Cir. BAP 1994); *See also In re Sirefco, Inc.*, 144 B.R. 495, 496 (Bankr. D. Mont.1992) (*de minimis* exception to general rule disfavoring retroactive fee awards exists where services are performed on essentially emergency basis, required application is made promptly thereafter, and only relatively short gap period and small sums are involved).

The Court has no problem finding that Seidlitz's services benefitted the estate in a significant way. However, there has been no satisfactory explanation given for the failure to receive prior judicial approval of Seidlitz's employment. *THC Financial*, 837 F.2d at 392. Seidlitz stated he is not familiar with bankruptcy law and was not advised of the Debtors'

bankruptcy case. The Court believes him, but Debtors were charged with constructive knowledge of the law's requirements, including the need to obtain court approval of Seidlitz's employment. *See, e.g., Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir.1987). Deschenes and Radford both are experienced bankruptcy practitioners, but neither provided any explanation why, despite discussing the personal injury claim at the Debtors' § 341 meeting, no employment application for Seidlitz was filed for more than a year. For the failure to provide a satisfactory explanation of the failure to obtain prior judicial approval of Seidlitz's employment, under *THC* and other mandatory authority cited above, the Court denies the Trustee's Application for compensation of Seidlitz.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this Chapter 13 case under 28 U.S.C. § 1334(a).
2. The Trustee's Application for Payment of Attorney Fees and Costs for John Seidlitz is a core proceeding under 28 U.S.C. § 157(b)(2).
3. The Trustee failed his burden to satisfactorily explain the failure to receive prior court approval of John Seidlitz's employment as required for retroactive approval of Seidlitz's employment under the holdings of *In re Atkins*, 69 F.3d 970, 973 (9th Cir. 1995) and *Okamoto v. THC Financial Corp.*, 837 F.2d 389, 392 (9th Cir.1988). *See also In re Larson*, 174 B.R. 797, 802 (9th Cir. BAP 1994).

IT IS ORDERED a separate Order shall be entered in conformity with the above, denying the Trustee's Application for Payment of Attorney Fees and Costs for John E. Seidlitz, Jr., filed June 3, 2005, for failure to satisfactorily explain the failure to receive prior court approval of Seidlitz's employment as required for retroactive approval under the holdings of *In*

re Atkins, 69 F.3d 970, 973-74, 976 (9th Cir. 1995), and *Okamoto v. THC Financial Corp.*, 837 F.2d 389, 392 (9th Cir.1988).

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana